# "PLAY IN THE JOINTS BETWEEN THE RELIGION CLAUSES"AND OTHER SUPREME COURT CATACHRESES

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Even when the U.S. Supreme Court reaches the right result in a matter involving church-state relations, the Justices too often do so for the wrong reasons. *Cutter v. Wilkinson*[1] is illustrative. Decided during the Court's last term, *Cutter* reversed a lower court that had struck down as unconstitutional the Religious Land Use and Institutionalized Persons Act.[2] Known by the clunky acronym RLUIPA, this relatively new congressional statute tempers the impact of zoning decisions on religious organizations, as well as assists those individuals of faith who are incarcerated in our country's jails and penitentiaries. In these two quite distinct arenas where regulation is pervasive, RLUIPA requires that laws having a disparate impact on a religious organization or a particular religious observance must yield to the needs of the religious liberty claimant. This means that the religious claimant is exempt from the strictures of a law generally binding on others. The exemption holds unless officials can show that the claimant should not be excused—even in just this one circumstance—because of likely serious public harm such as a traffic hazard or a prison security breach.

In *Cutter*, the three-judge panel of the United States Court of Appeals for the Sixth Circuit reasoned that RLUIPA's exemption specifically for religious observance constituted a preference for religion, and that the no-establishment command in the First Amendment did not permit legislation to prefer religion over nonreligion. That is not the law, and there was little doubt that the Sixth Circuit's decision would not stand up on appeal. From a certain perspective, however, one has to empathize with the confused judges of the circuit court. In the Supreme Court's decision in *Kiryas Joel Board of Education v. Grumet*, Justice Souter did say in oft-quoted *obiter dictum* that the Establishment Clause prohibits government from "favoring . . . religious adherents collectively over nonadherents."[3] But the High Court, in its high-handed fashion, does not always mean what it

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1. 544 U.S. 709 (2005).

2. *Id.* at 724-25 (upholding the constitutionality of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5 (2006)).

3. 512 U.S. 687, 696 (1994).

says. In this instance, it is a good thing. At the time of the *Cutter* appeal there were no less than three prior cases (and none to the contrary) where the Court held four-square in favor of a congressional statute that exempted religious practices from legislative burdens that others had to bear. It is instructive to bring them to mind. In *Arver v. United States*, exemptions from the military draft for clergy and seminarians were found not to violate the Establishment Clause.[4] In *Gillette v. United States*, an exemption from conscription into military service for those who oppose war in all circumstances was upheld.[5] Finally, in *Corporation of the Presiding Bishop v. Amos*, the Court approved a broad statutory exemption in a civil rights employment nondiscrimination act for religious organizations making staffing decisions based on religion.[6]

The rationale behind *Arver*, *Gillette*, and *Amos* is simple enough: For regulatory legislation to exempt a religious practice is for Congress to leave religion alone. A state does not establish religion by leaving it alone.[7] Indeed, for government to leave religion alone reinforces a separation between these two centers of authority—state and church—that is good for individual religious liberty, good for the autonomy of religious organizations, and good for the state.

The upholding of RLUIPA in *Cutter* should have been easy for the Supreme Court, just another increment in a lengthening line of precedent. It was not to be. In an opinion by Justice Ginsburg, a unanimous Court charted the task before it as "find[ing] a neutral course between the two Religion Clauses," which by their nature "tend to clash."[8] Thus its assignment, as the Court saw it, was to determine if RLUIPA fell safely in the narrows where "'there is room for play in the joints' between the Clauses" and thus there still remained "space for legislative action neither compelled by the *Free Exercise Clause* nor

4. 245 U.S. 366, 389-90 (1918).

5. 401 U.S. 437, 460 (1971).

6. 483 U.S. 327, 334-40 (1987).

7. The Establishment Clause reads, "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I. By the literal text, for Congress to enact a law about religion generally is not prohibited. Rather, what is prohibited is a law about, more narrowly, an "establishment" of religion. For example, it is fully consistent with the Establishment Clause for Congress to enact comprehensive legislation requiring employers to provide unemployment compensation to their employees, but to then exempt religious organizations from the act. Such a religion-specific exemption is certainly to "make [a] law respecting" religion, but more narrowly the exemption does not establish religion. *See* Rojas v. Fitch, 127 F.3d 184, 187-89 (1st Cir. 1997) (holding that a religion-specific exemption for faith-based organizations from unemployment compensation tax did not violate the Establishment Clause).

8. 544 U.S. at 719 (quoting Walz v. Comm'n, 397 U.S. 664, 668-69 (1970)).

prohibited by the *Establishment Clause*."[9] Clearly the Court contemplates that the free-exercise and no-establishment principles run in opposite directions, and indeed will often conflict. It is as if the Court envisions free-exercise as pro-religion and no-establishment as, if not anti-religion, then at least tasked to hold religion in check. Such a view—wrongheaded, as I shall point out below—places the nine Justices in the power seat, balancing free-exercise against no-establishment, in whatever manner a five to four majority deems fair and square on any given day. Such unguided balancing accords maximum power to the Court (or worse, power to one "swing" justice), while trenching into the power of the elected branches.

The view that the First Amendment's text, free-exercise and no-establishment, are frequently in tension, and at times are in outright war with one another, is quite impossible. The full powers of the national government are enumerated and limited, an original understanding later made explicit in the Tenth Amendment. When ratified in 1791, the Bill of Rights did not vest more power in the national government. Rather, the fears of the Anti-Federalists, who were prominent in the First Congress, drove them to just the opposite objective: to deny to the central government the power to interfere with essential liberties (for example, speech, press, jury trial) that might otherwise be implied from the more open-ended delegations of power in the Constitution of 1787. The Federalists, in turn, gave little resistance to this enterprise because their position all along was that the national government had not been delegated such powers in the first place. Indeed, James Madison, Jr., a Federalist at this time in his career and the principal theorist behind the 1787 Constitution, led the charge for a Bill of Rights. The Federalists harbored a different anxiety, namely, to avoid a second constitutional convention as sought by Patrick Henry and others favoring state sovereignty. Adding a Bill of Rights would sap whatever popular support Henry had behind his effort. So Congress settled on the text of the proposed articles of amendment in mid-September 1789 with little more than the usual give and take. Twelve articles were submitted to the states, but only ten were ratified. The successful articles (numbers three through twelve) were thought to alter very little the status quo, but the Bill of Rights did calm the anxieties of many citizens over the centralization of national power, while serving as a useful hedge against possible future encroachments.

Most pertinent for present purposes, each substantive clause in the first eight amendments (the Ninth and Tenth read as truisms) was

9. *Id.*

designed to anticipate and negate the assumption of certain powers by the national government—a government already understood to be one of limited, enumerated powers. Thus, for example, the free-speech provision in the First Amendment further limited national power—or, from the Federalists' perspective, merely made clear that the central government had never been delegated power to abridge freedom of speech in the first place. Likewise, the free-press provision further limited national power. These two negations on power—the speech and press clauses—can reinforce one another but they cannot conflict. Simply put, it is impossible for two denials of power to conflict. Similarly, the free-exercise provision further restricted national power and the no-establishment provision likewise restrained national power. These two negations—the Free Exercise Clause and the Establishment Clause—can overlap and thereby doubly deny the field of permissible governmental action, but they cannot conflict.[10] Moreover, the clauses-in-conflict fallacy would attribute to the drafters, the founding Congress of 1789-90, the error of placing side by side two constitutional clauses that work against one another. That is just too implausible to take seriously.

The Court's wrong turn has its origin, as best I can determine, in *Widmar v. Vincent*.[11] *Widmar* is yet another result that is rightly decided but for the wrong reason. The case involved a state university that allowed student organizations to use classroom buildings to hold their meetings. When a religious student organization sought to schedule space to conduct meetings that included worship, the university balked, citing the need for strict separation of church and state as required by the Establishment Clause. The Court, relying on a long line of precedent that prohibited the government from discriminating based on the content of one's speech, had little trouble ordering the state university to give equal access to all student organizations without regard to religion.[12]

If only the Justices had stopped right there. Alas, having explained

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10. In candor, there is one exception to the "no conflict" logic, i.e., government-provided religion in prisons and the armed forces. The rationale is that the free-exercise rights of a prisoner or soldier overrides the duty on government to not establish religion. This occurs because of the unusual situation where government has removed individuals from general society (prison or posting at a military base), thereby preventing them from freely securing their own access to spiritual resources. This singular exception for government-employed chaplains is *sui generis*; hence it does not disprove the rule that the Religion Clauses do not conflict.

11. 454 U.S. 263 (1981). One could attribute the slip earlier in time to *Walz*, where the Court wrote that it "has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." 397 U.S. at 668-69. But *Walz* stopped short of saying that the solution, in the event of a conflict, was that one clause should trump the other. *Widmar* took that fatal step.

12. 454 U.S. at 276.

that the no-establishment principle did not justify the university's hostility on these precise facts, the Court fatefully went on to leave open the possibility that on a different set of facts, no-establishment could override the students' right to freedom of speech. Once again, this is logically impossible: two negations on governmental power can overlap but they cannot conflict. What the Court should have said—had it been thinking—is that a finding that the Justices thought pivotal to the result in *Widmar* is that the speech in question was private speech not government speech. Private speakers have speech rights; the government does not have speech rights. If the worship service had been conducted at the behest of the university (hence government speech),[13] then no-establishment rather than free-speech would have been the relevant restraint. Instead, the *Widmar* Court asked if the Establishment Clause conflicted with, and thus overrode, the Free Speech Clause. Taking that wrong path has made all the difference.[14]

One might further crowd the Court with this inquiry: When two First Amendment provisions conflict, why do the Justices choose no-establishment to override free-speech or free-exercise rather than vice versa? Is there a sliding scale of rights in the Constitution, some more valuable than others? Where are we to find this hierarchy of constitutional rights, or is that too to be trusted to the balancing of nine unelected Justices?

The Free Exercise Clause and the Establishment Clause do not

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13. Concededly, on altogether different facts it can be a close call whether the speech in question is private or government. An example of the private versus government question being difficult is student-initiated prayer at the opening of a public high school football game. In *Santa Fe Independent Sch. Dist. v. Doe*, a divided Court attributed the student's prayer to the government. 530 U.S. 290, 315-17 (2000). That seems rightly decided.

14. This pseudo clash-of-the-clauses can cause all sorts of mischief. For example, in the logical desire to not have no-establishment in conflict with free-exercise some argue that there is but one Religion Clause, not two. *See, e.g.*, Richard John Neuhaus, *A New Order of Religious Freedom*, 60 GEO. WASH. L. REV. 620, 627-29 (1992) (maintaining that the no-establishment text is merely instrumental to the free-exercise text); John T. Noonan, Jr., *The End of Free Exercise?*, 42 DEPAUL L. REV. 567, 567 (1992) (making the same argument). This is grammatically correct so far as it goes. That is, up to the first semicolon of the First Amendment there is one clause with two adjectival participial phrases modifying the object ("no law") of the verb ("shall make"). But it is grammatically incorrect to argue, as these commentators do, that the first participial phrase is instrumental to the second participial phrase. Rather, each phrase is equal and operates independent of the other.

Of course the aim of the one-Religion-Clause argument is not to correct the Court's grammar, but to keep no-establishment and free-exercise from conflicting and thus working at cross-purposes. The objective of these commentators is right-minded but their proposed solution is wrong. There is a far more plausible, historically grounded, and grammatically correct way of keeping the two participial phrases from conflicting while giving each phrase essential, independent work to do in the service of religious freedom. *See generally* Carl H. Esbeck, *Differentiating the Free Exercise and Establishment Clauses*, 42 J. CHURCH & ST. 311 (2000).

conflict. Instead, they do different work, each in its own way protecting religious liberty and properly ordering church-state relations.[15] When circumstances are such that their labors overlap, the Religion Clauses necessarily compliment rather than conflict. Thus the Court's imagining these two negations on governmental power as frequently clashing—two bones grinding one upon the other at an arthritic joint that has lost its "play"—is a dangerously misguided metaphor.

15. *Id*. at 323-25 (explaining that the clauses-in-conflict problem is avoided by a rights-based free-exercise clause and a structural no-establishment clause, each in its own way protecting religious freedom).